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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD MCNEILL,

Defendant and Appellant.

C061801

(Super. Ct. No.
07F1314)

Defendant entered a negotiated plea of no contest to one count of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admitted a prior strike conviction (Pen. Code, § 1170.12).¹ Imposition of sentence was suspended and defendant was put on three years of Proposition 36 probation. After defendant repeatedly violated his probation, the court sentenced defendant to an aggregate term of four years in state prison. Defendant appeals his sentence, claiming the trial court erred in refusing to strike his prior strike conviction. We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

In light of defendant's no contest plea, the facts are taken from the probation report.

In January 2007 defendant was taken into custody on an outstanding warrant. Inside the jail, defendant was searched and a bag of methamphetamine weighing .36 gram, along with a switchblade, were found on his person. Defendant was charged with possessing a controlled substance. It was further alleged that defendant was previously convicted of robbery (§ 211), a strike felony under section 1170.12.

In March 2007 defendant pled no contest to possessing a controlled substance and admitted the prior conviction. The court suspended imposition of sentence and placed defendant on Proposition 36 probation for three years. Nine months later, a petition for revocation of probation was filed, alleging defendant failed to report to his probation officer. Defendant admitted the violation and his probation was revoked and reinstated.

Four months later, in April 2008, a second petition for revocation of probation was filed, alleging defendant tested positive for methamphetamine. Defendant, again, admitted the violation and his probation was revoked and reinstated. Two more petitions to revoke defendant's probation were filed, in May and August 2008. In September 2008 defendant admitted the violations, his probation was revoked, and the matter was sent to probation for a sentencing report.

In March 2009 defendant filed a motion asking the trial court to strike his prior strike pursuant to section 1385. Shortly thereafter, a fifth petition to revoke defendant's probation was filed. This time, defendant denied the allegations.

On April 24, 2009, the court held a combined hearing on defendant's probation violations and motion to strike the prior strike conviction. At the conclusion of the hearing, the trial court sustained the petition for revocation of defendant's probation that was filed on March 13, 2009 (the fifth petition), and denied his *Romero*² motion. The court then sentenced defendant to two years in state prison for possessing methamphetamine, doubled to four years pursuant to the "three strikes" law. Defendant appeals.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his motion to strike the prior conviction enhancement. Finding no abuse of discretion, we shall affirm.

Section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (§ 1385, subd. (a).) In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court held that a trial court may utilize section 1385 to strike or vacate a prior strike for purposes of sentencing under the three strikes law, "subject, however, to strict

² *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*).

compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero*, at p. 504.) Likewise, a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

In ruling on a *Romero* motion, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the

trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

In support of his claim that the trial court abused its discretion, defendant argues "[a] review of [defendant's] entire history . . . demonstrates not so much that the trial court denied the *Romero* request based on his criminal record as it was denied—as a practical matter—as a consequence of [defendant's] substance abuse problems, mental health issues, and socio-economic hardships."

Defendant also argues that the 10 convictions he received after his strike conviction were "low-level" convictions, accumulated as a result of his homelessness. Thus, he contends they do not show that he possesses a criminal mentality, but rather, the conduct of a person just trying to "'survive on the street.'" He further argues that his difficult and violent childhood suggests this is an exceptional case warranting dismissal of the strike. We are not persuaded.

All of the foregoing was laid out to the trial court by defense counsel and in the probation report. In denying defendant's motion, the court explained: "It seems like you have refused—refused over the course of your life to take responsibility for your own actions and commit, and you failed to commit, to this Prop 36 program despite the fact that you were aware way back in '07 when you pled that you're looking at six years in state prison."

"So, I do agree in assessing the prior burglary or robbery charge that, uhmmm, unfortunately, this—this doesn't fit into the tenor of what the *Romero* motion would require.

"So, in looking through and balancing the—the fact that you have not had a law-abiding life, the fact that you've been involved in miscellaneous criminal activity that speaks of somebody that's in the system—it's not like they're all driving on a suspended license charges. You're in the system. You're living amongst people that are criminals. You're involved in criminal activity—for that reason, I'm going to deny the request to strike the previous 211."

It is obvious from the foregoing that the trial court understood its discretion to grant the motion to strike but concluded this case does not warrant such extraordinary action. Defendant has a criminal record stretching back to 1980, when he was convicted of receiving stolen property. This was followed by a probation violation in 1981. Then, in 1990, he was sent to prison on a 90-day diagnostic commitment.

Following his release from prison, defendant accrued ten more convictions over nine years, including convictions for various drug offenses, disturbing the peace, receiving stolen property, battery, and being a felon in possession of tear gas.

The three strikes law establishes sentencing norms and "creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) This presumption will be rebutted only in an "extraordinary case—where the relevant factors

described in [*People v.*] *Williams*, *supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ." (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

Moreover, "when a defendant has a drug addiction or substance abuse problem, where the defendant has failed to deal with the problem despite repeated opportunities, where the defendant shows little or no motivation to change his life style, and where the substance abuse problem is a substantial factor in the commission of crimes, the need to protect the public from further crimes by that individual suggests that a longer sentence should be imposed, not a shorter sentence." (*People v. Reyes* (1987) 195 Cal.App.3d 957, 963.)

The record here demonstrates the trial court exercised its discretion and concluded this is not such an extraordinary case as to warrant dismissal of the strike. Under the facts and circumstances presented, particularly defendant's refusal to deal with his addictions despite being given numerous opportunities, we cannot say this conclusion is "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.) We therefore find no abuse of discretion.³

³ The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he has a prior conviction for a serious or violent felony. (§ 4019, subds. (b) and (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.